United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-6096

To be argued by
LEONARD GREENWALD

United States Court of Appeals

B

FOR THE SECOND CIRCUIT

Docket No. 76-6096

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL.,
Defendants-Appellees,

—and—

COUNCIL OF SUPERVISORS AND ADMINISTRATORS, LOCAL 1, AFSA, AFL-CIO, ET AL.,
Intervenors-Appellants,

—and—

COMMUNITY SCHOOL BOARD, DISTRICT 26,
Intervenors-Appellants.

AND

UNITED STATES OF AMERICA,
Petitioner-Appellee,

—against—

SOLOMON DEREWETZKY, ET AL.,
Respondents-Appellants.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, AFSA, AFL-CIO, et al.

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BRIEF FOR COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, AFSA, AFL-CIO, et al.

STATEMENT OF THE CASE

A. Preliminary Statement.

This appeal is taken by the appellants-intervenors, Council of Supervisors and Administrators of the City of New York, Local 1, AFSA, the exclusive collective bargaining representative of all employees of the Board of Education of the City of New York serving in supervisory or administrative positions in New York City and its officers and employee-school principals ("CSA"), and appellant-intervenor Community School Board, District 26 ("District 26"). CSA was granted intervenor status on June 16, 1976. District 26 was permitted to intervene on July 15, 1976.

The order appealed from was entered in the United States District Court for the Eastern District of New York (Weinstein, D.J.) on July 15, 1976. It adopted the report of the Magistrate filed July 7, 1976 but struck "as being unnecessary at this time" Part VI of the Magistrate's opinion (A-391).* The order also stayed the appellee-plaintiff Office of Civil Rights of the Department of Health, Education and Welfare ("the Government" or "OCR") "from placing into its computer, i.e., inputing into the existing data base, any data or information

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*References are to the Joint Appendix unless otherwise indicated.

being obtained from the EEO-5 forms and Special Compliance Reports for fourteen (14) days from the date of this order . . ." (A-391). In accepting the Magistrate's report, except as modified in the order, the Court made the following conclusions of law, in opposition to which, this appeal is taken: that "The Government is entitled to information sought in connection with the EEO-5 forms and Special Compliance Reports" (A-377); that "The identification of principals, while requiring self-labelling, deals with qualities such as ethnic background and skin color, which is usually apparent and always immutable. While a person may abandon friends, associations and beliefs, through identification, he cannot change the qualities associated with his ethnicity and therefore, no right protected by the First Amendment, is abused by the Court's order." (A-381); that "There is no question but that privacy is an interest that enjoys constitutional protection, however, necessity has often overridden claims to privacy more compelling than that defended by intervenors." (A-382). Finally, exception is taken to the Court's opinion that "Part VI of the Magistrate's report is stricken as being unnecessary at this time. Any individual seeking to rely on his personal right not to incriminate himself may apply at any time to this Court by order to show cause pleading the privilege and providing a basis for the plea. Since no individual has made such a claim, the issue is not ripe for decision." (A-391).*

*The Magistrate's opinion and conclusions appear at pages A-376 et seq. of the Joint Appendix.

B. Proceedings Prior to CSA Intervention.

The Government commenced the instant action on May 10, 1976 to enjoin the defendants-appellees Board of Education, et al. ("Board of Education") from wilfully failing to furnish certain Special Compliance Reports and EEO-5 forms sought by the OCR addressed to the ethnic composition of the supervisory, teaching and student bodies of the New York City School System (A-5). With the consent of the Government and Board of Education, a special master was appointed to conduct a hearing and to report proposed findings of facts and conclusions of law. The special master reported his findings on May 27, 1976 (A-200). On the same day, the District Court permanently enjoined "the defendant Board of Education . . . the defendant members of the . . . Board and the defendant Chancellor . . . and their agents, employees, subordinates, and all persons or entities in active concert or participation with them or subject to their supervision in this matter . . ." from refusing or failing to submit the forms sought by the OCR (A-214).

Subsequent to the issuance of the aforementioned Order, CSA together with its officers, were subjected to an action charging it with contempt of the Order of May 27, 1976. The action charged CSA and its principals with encouraging, advising, and assisting its members . . . to disobey the injunction . . . The Court ordered the CSA to cease and desist from participating in the acts alleged. CSA fully complied with the District Court's order.

C. The Proceedings Below.

Following the grant of CSA's motion to intervene on June 16, 1976, the District Court ordered an early hearing on the issues raised by the union on behalf of its members-school principals. CSA contended that school principals could refuse to identify themselves or others as being of any race, color or national origin by virtue of guarantees shielded by the United States Constitution.

During the course of ensuing proceedings, CSA moved the District Court for orders vacating its May 27, 1976 injunction, or, in the alternative, modifying the injunction to allow school principals to remit the sought-after documents to the Court's custody pending a final resolution on the merits of CSA's contentions. The motions were denied.

Pending the outcome of a new determination by the Court on CSA's claims, the Government, on June 18, 1976, initiated contempt proceedings against one-hundred thirty-five school principals who refused to participate in the OCR racial survey. Following a hearing on their reasons for refusing to comply and concessions of willingness to comply under protest, the charges against all, except one school principal, were dropped.* An

*The Government also pressed charges against forty-six other school principals. Following a hearing on June 28, 1976, and similar concessions of willingness to comply under protest, the charges were dismissed.

application to this honorable Court for a temporary stay of the District Court's May 27, 1976 Order followed on June 22, 1976. The application was denied.

On June 23, 1976, the District Court found that one school principal who had maintained his refusal to supply the required information was in civil contempt of the May 27 Order (A-357). The District Court stayed implementation of the order of incarceration pending this Court's determination of a motion to stay enforcement of the civil contempt judgment pending an appeal of the civil contempt judgment (A-369).

Although the District Court refused further applications for a stay of its previous injunction, it did, on June 24 preliminarily enjoin the Government from placing its ethnic survey data into its computer pending the final determination of the new issues raised. The Government did not appeal the Court's order.

On July 15, 1976, the District Court issued its final decision on the merits of CSA's contentions. Those portions of the order appealed from appear supra.

Oral argument on several motions made by CSA to this honorable Court respecting separate aspects of the proceedings below were heard on July 20, 1976. This Court denied on July 22, 1976 the several applications for a stay of enforcement of the May 27, 1976 District Court Order, leave to appeal the civil contempt judgment, stay of execution of the civil contempt judgment and extension of the fourteen day stay granted by the District Court on July 15, 1976.

QUESTIONS PRESENTED

1. Whether Part VI of the Magistrate's Report is ripe for decision, it being asserted that school supervisory personnel are being required to produce involuntarily possible incriminating information concerning the racial composition of their school populations without the benefit of due process and the right to invoke the privilege against self-incrimination.

2. Whether school supervisory personnel may claim a constitutional right of privacy against involuntary disclosure of personal racial and ethnic characteristics as well as information concerning the racial and ethnic composition of pedagogical and student populations.

STATEMENT OF FACTS

The Government supports its claim to certain racial and ethnic information concerning the population of the New York City public school system, presently required to be collected and produced by school principals, upon the following authorizations. 45 C.F.R.§80.6 provides, in part:*

> "§80.6 Compliance information.
> (a) Cooperation and assistance. The responsible Department official** shall to the fullest extent practicable seek the cooperation of recipients*** in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

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*Promulgated under general authority of 42 U.S.C. 2000(d)-1.

**"The term 'Department' means the Department of Health, Education, and Welfare, and includes each of its operating agencies and other organizational units." 45 C.F.R.§80.13(a).

***"The term 'recipient' means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program." 45 C.F.R. §80.13(i).

"(b) Compliance reports. Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

"(c) Access to sources of information. Each recipient shall permit access by the responsbile Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law. . ."

In addition, 29 C.F.R. §1602.41(a) states:

> "On or before November 30, 1974, and annually thereafter, certain public elementary and secondary school systems and districts, including individually or separately administered districts within such systems or districts shall file with the Commission or its delegate executed copies of Elementary-Secondary Staff Information Report E.E.O.-5 in conformity with the directions set forth in the form and accompanying instructions. The elementary and secondary school systems and districts covered are: (1) Every one of those which have 100 or more employees, and (2) every one of those others which have 15 or more employees from which the Commission requests the filing of reports. Every such elementary or secondary school system or district shall retain at all times, for a period of 3 years, a copy of the most recently filed report E.E.O.-5 at the central office of the school system or district, or the individual school which is the subject of the report, where more convenient, and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of Section 710 of Title VII, as amended. It is the responsibility of the school systems or districts above described in this section to obtain from the Commission or its delegate necessary supplies of the form."

Purportedly acting upon those authorizations, the Government published and subsequently furnished to defendant Board of Education, a "recipient" of federal financial assistance, certain questionnaires (viz., EEO-5 Forms and Special Compliance Reports) which seek to elicit information, including "racial and ethnic data", presumably germane to an as yet undisclosed and unspecified investigation into the New York

York City public school system respecting possible violations of various laws pertaining to recipients of federal financial assistance.

The recipient Board of Education, in turn, referred to its school principals, among others, the task of providing the information required by the Government's survey. As pertinent herein, the survey requires of a school principal as follows:

> A. With respect to him or her self, information regarding his/her race and/or ethnic identity in one of five OCR designated categories -- White (not of Hispanic origin); Black (not of Hispanic origin); Hispanic; Asian or Pacific Islander; American Indian or Alaskan Native (EEO-5 Form)*. In this and the other two classes of racial information required, only <u>one</u> of the five categories may be selected. Mixing is not permitted.

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*The Government's EEO-5 instruction booklet (referred to in the Addendum to this Brief at p.36) defines the five "racial" categories as follows:

> "White (not of Hispanic origin) -- All persons having origins in any of the original peoples of Europe, North Africa, the Middle East, or the Indian subcontinent.
>
> Black (not of Hispanic origin) -- All persons having origins in any of the black racial groups.
>
> Hispanic -- All persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

B. With respect to faculty and staff, information regarding their race and/or ethnic identity in one of the five OCR designated categories (EEO-5 Form).

With respect to the information required to be provided by the principal in "B" above, OCR's instructions state: "You may acquire the race/ethnic information necessary for this report either by visual surveys of the work force, or from post-employment records as to the identity (sic) of employees." (Addendum to Brief at p56). That direction, however, is followed by the caveat that: "Eliciting information on the race/ethnic identity of any employee by direct inquiry is not encouraged. An employee may be included in the minority group to which he or she appears to belong, or is regarded in the community as belonging." (Addendum to Brief at p56) (emphasis added) In hopeful recognition that the very maintenance of dossiers which include an individual's racial

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Asian or Pacific Islander --All persons having origins in any of the original peoples of the Far East, Southeast Asia, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Phillipine Islands, and Samoa.

American Indian or Alaskan Native -- All persons having origins in any of the original peoples of North America.

Substantially the same racial definitions are provided for the other two categories of racial information sought, i.e., faculty (EEO-5 Form) and students (Special Compliance Report) (A-69; A-19 et seq.)

In both cases of faculty and students, the OCR concedes that "Race/ethnic designations as used by the Office of Civil Rights do not denote scientific definitions of anthropological origins.: (A-19 ; Addendum to Brief at p.56).

characteristics oftentimes subverts the very purposes sought to be achieved by our anti-discrimination laws, the OCR warned that: "Where records are maintained, it is recommended [but not required] that they be kept separately from the employee's basic personnel file or other records available to those responsible for personnel decisions." (Addendum to brief at p. 56). Furthermore, with respect to the information required in "A" and "B" above, the principal must certify that ". . . the information given in this report is correct and true to the best of my knowledge and was prepared in accordance with accompanying instructions. Wilfully false statements on this report are punishable by law . . ." (A-70). The principal, moreover, must identify the school he heads by name and address. Finally, certain portions of the information gathered may be obtained by at least three separate governmental agencies including the Equal Employment Opportunity Commission, the Office of Education and OCR. As explained in OCR's instruction booklet ". . . all three organizations plan to publish or otherwise make available statistics combining school systems into geographic aggregates, such as States, regions, etc. As restricted by Section 709(e) of the Civil Rights Act of 1964, the EEOC will not publish any data other than such aggregates. The Office of Civil Rights may, as in some of its previous surveys, publish data by school system and for individual schools. The Office of Education will

publish only individual school system data for those systems that have not indicated on the form that they are withholding authority for such publication.".* (Addendum to brief at p.54).

The last category of racial information required to be provided concerns the student composition of a particular school. In addition to being compelled to identify him or her self as belonging to an arbitrarily defined racial/ethnic group, and to identify faculty and staff in like manner, the principal is also called upon to differentitate, classify and racially segregate the student population in the same way. Here, the caution previously noted regarding the information gathering method is considerably strengthened. The instructions supplied by the defendant Board of Education accompanying the Special Compliance Reports underscore the importance of methodology: "The ethnic data are to be obtained by teacher observation only. Do not ask anyone his or her race or ancestry." (A-41)(emphasis in original).

The Government and defendant Board of Education's apparent "concern" respecting student sensibilities on an admittedly delicate issue--racial self-identification--did not extend to those individuals who were ultimately charged with the indelicate and distasteful task of gathering and furnishing the offensive information.

*There is no provision made on the EEO-5 form, however, for such withholding.

On June 18, 1976, the Government initiated an action for civil and criminal contempt against one-hundred thirty-five school principals who, acting by their conscience,* refused to submit to coerced racial self-identification or to return indictments against others purely on the grounds of race. On June 25, 1976, forty-six more school principals were named for the same offense. One school principal faces the immediate threat of incarceration.

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*Typifying school principals' reasons for refusing to comply with the Government's racial survey was the testimony offered by School Principal Blanche Schwartz in hearings on the contempt charges before Judge Weinstein:

> "I find it extraordinarily painful to have to respond in this case, because I am, your Honor, the product of a rather large mid-European family, who about 35 years ago was forced to respond to another type of ethnic survey, and as a result, about 45 of them did not survive. Therefore, I find this a tremendous moral decision to make, because I did not believe in ethnic surveys, nor do I believe in quota systems. As a matter of fact, when I was a student at Columbia University, I was forced to fill out an application form which asked me what my religion was, because obviously Columbia had a quota system, and I see the actions of HEW as on the platform of the reformation of the quota system.
>
> If I had faith in the work of the HEW, I would have more faith in ethnic surveys.
>
> As a principal for many years standing, almost 20 years, your Honor, I have not regarded children as white, black or Puerto Rican, but as my children. I have done my best. I have never discriminated, nor has discrimination existed in the school of which I was a principal, and I feel I have done a good job, and I feel that most other principals in this city follow suit in that, your

(over)

(footnote continued)

Honor. I feel that also there is moral obligation. However, I do not want to go to jail. I do not want to suffer penalties, and this is a tremendously painful decision, and I wish I could have more time to make this decision, but I will have to be forced to comply under great duress, and this is a really great blow to my moral convictions to do this." (A-299, 300). Other statements are contained in the Joint Appendix at A-308, A-311, A-372, A-373. While these statements accurately reflect, we feel, the sincerely held beliefs of many school principals, we concede that the statements were adduced without benefit of cross-examination or evidence in rebuttal.

ARGUMENT

POINT I

SCHOOL SUPERVISORY PERSONNEL MAY NOT BE REQUIRED TO PRODUCE INVOLUNTARILY POSSIBLE INCRIMINATING INFORMATION CONCERNING THE RACIAL COMPOSITION OF THEIR SCHOOL POPULATIONS WITHOUT THE BENEFIT OF DUE PROCESS AND THE RIGHT TO INVOKE THE PRIVILEGE AGAINST SELF-INCRIMINATION GUARANTEED BY THE FIFTH AMENDMENT.

A. Introduction

The Magistrate's Report, Part VI (at p. 11 of the decision, submits that

> The persons burdened with reporting [EED-5 and Special Compliance Reports] are potential targets of ... [criminal] complaints and they should, therefore, be permitted, if they wish, to object to being required to report on their own observations."

The instant case is based upon elements which distinguish this situation from that in California v. Byers, 402 U.S. 424 (1971).

California v. Byers, supra, represents one of a large body of Supreme Court decisions which involve the permissible scope and procedural requirements concerning government demands upon citizens for possibly incriminating information. In Byers, California appealed the lower court's decision to sustain a demurrer to the indictment charging appellee with failure to stop and furnish his address after involvement in an automobile accident. The Court characterized the statute requiring such action as essentially "regulatory"

and "non-criminal." The regulatory scheme was not aimed at "a highly selective group inherently suspect of criminal activities." 402 U.S. at 429 (quoting from Albertson v. SACB, 382 U.S. 70 (1965)). In reaching this conclusion, Chief Justice Burger observed that:

> "Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly." 402 U.S. at 424.

We submit that the District Court has been "confronted with the question" as framed above.

In this case, school principals and other supervisors have been required, on pain of citations for contempt of the District Court, to furnish manifold data concerning the racial and ethnic composition of their school populations. The purpose of this investigation is to "seek specific facts which will aid them [the government] in determining if any School Board, its members and/or employees have engaged in acts of discrimination or violations of the civil rights of various complainants." (Magistrate's Report, Part VI at p. 8). The Magistrate, in Part VI, sets forth the relevant texts from the Civil Rights Law of New York State, New York State Penal Code, and

New York State Penal Law, all of which establish that "a cognizable claim exists that the production of the information sought may lead to the [criminal] conviction of ... individuals." (Magistrate's Report, Part VI, at p. 8). No immunity has been offered to the reporting principals and other supervisors. Consequently, as CSA will assert hereinbelow, these individuals are currently being compelled to come forth with disclosures which contain an incriminating potential, in violation of Fifth Amendment privilege and due process.

B. The Court Has Manifestly Recognized That Fifth Amendment Due Process and Privilege Guarantees Inhere in Administrative Adjudicatory Investigations.

Although the Supreme Court has been presented with issues requiring the application of the Fifth Amendment privilege to "compulsory production" since the nineteenth century (see, e.g., Boyd v. United States, 116 U.S. 616 (1886),* it was not until the proliferation of regulatory and administrative agencies in the 1930's that the question of compelled disclosure of potentially incriminating evidence assumed greater urgency and frequency in the administrative context. In Norwegian

* In Boyd, the Court struck down a provision of the customs revenue laws on the grounds, inter alia, that: "We are further of opinion that the compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment ..." 116 U.S. at 635.

Nitrogen Products Co. v. United States,* 288 U.S. 294 (1932), Justice Cardozo observed:

> "Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditionary forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. ... It is very different, however, when orders are directed against public service corporations limiting their powers in the transaction of their business.... The 'hearing' that such commissions are to give must be adapted to the consequences that are to follow ... " 288 U.S. at 318, 319.

The basic dichotomy between "investigatory" administrative activity has continued to provide a primary test for the decision whether or not to ensure Fifth Amendment safeguards against compelled disclosure of possibly incriminating information.

It is this dichotomy to which the Special Master refers in differentiating this case from that in Byers:

> "The situation herein does not involve as generalized a search for information as exists in income tax statutes or accident reporting requirements. Complaints have been made of deprivations of the civil rights of students and others. The study being undertaken is addressed to these complaints, the

*Involving the requirements for hearings before the Tariff Commission.

> persons burdened with reporting are potential targets of these complaints ... " (Special Master's Report, Part VI (at p. 11 of the decision)).

The situation here presented to the Court arises from an administrative investigation which makes "determinations in the nature of adjudications affecting legal rights," Hannah v. Larche, 363 U.S. 420, 451 (1959), and which requires the disclosure of information "which would furnish a link in the chain of evidence needed to prosecute the claimant ... " Hoffman v. U.S., 341 U.S. 479, 486 (1950). Of course, the concept of adjudicative investigations is not coextensive with those investigations which violate Fifth Amendment privilege and due process considerations. However, the former is a condition precedent to the possibility of the latter. Therefore, we shall first discuss the nature and scope of adjudicatory administrative investigations.

In Hannah v. Larche, supra, the Supreme Court discussed at length the "dichotomy" mentioned above. There, the Court was presented with the question whether the investigative procedures employed by the Commission on Civil Rights (established pursuant to the Civil Rights Act of 1957) violated appellants' Fifth Amendment rights of due process:

> "The specific rules challenged are those which provide that the identity of persons submitting complaints to the Commission need not be disclosed, and that those summoned to testify before the Commission, including persons against whom complaints

> have been filed, may not cross-examine other witnesses called by the Commission." 363 U.S. at 422.

Chief Justice Warren, speaking for the Court, set out the duties specified to be performed by the Commission (under Section 104 of the Civil Rights Act of 1957) as (a) to investigate complaints of violations of civil rights, (b) to gather information concerning the legal maintenance of discrimination, and (c) to report its findings and recommendations to the President and Congress. He concluded:

> "It is apparent from this brief sketch of the statutory duties imposed upon the Commission, its function is purely investigative and fact-finding. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, furnish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty or prosperity. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action." 363 U.S. at 440, 411.

The exhaustive description of administrative adjudicatory hearings presented in Hannah built upon predecessors such as Morgan v. United States, 304 U.S. 1 (1937); Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1950); and Greene v. McElroy, 360 U.S. 474 (1958), as well as Norwegian Nitrogen Products Co. v. U.S., supra.

In Greene v. McElroy, supra, the Court faced the issue of the validity of cold-war security clearance procedures which had no clear executive or legislative mandate. In striking down the ex parte revocation of security clearance which cost the petitioner his livelihood on the technical ground that they were not properly authorized, the Court went on to say that "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process." (360 U.S. at 507).

In Morgan v. U.S., supra, the Court voided the administrative determination of fixed stockyard commission rates by the Secretary of Agriculture, on the grounds that no proper hearings were afforded those immediately affected by the determination:

> "The ... question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the Legislature. ... in administrative proceedings of a quasi-judicial nature the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' -- essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence ... ,"304 U.S. at 14, 15.

In Anti-Fascist Committee v. McGrath, supra, the Court struck down the activities of the Attorney General in furnishing the Loyalty Review Board with the names of various organizations as "suspect" on the grounds that "the conduct

ascribed to the Attorney General ... is patently arbitrary." 341 U.S. at 137.

The investigative scheme in the case before this Court contains elements which include many, if not most, of the "adjudicative" indicia applied by the Supreme Court in Hannah and its predecessors. Under 45 CFR 80.8, compliance with the requirements of Title VI of the Civil Rights Act of 1964 can be remedied by "the suspension or termination" of the Federal funding, or "by any other means authorized by law" -- which may include referral to the Justice Department with the recommendation that

> "appropriate proceedings be brought to enforce any rights of the United States under any law of the United States ... and (2) any applicable proceeding under State or local law." 45 CFR 80.8(a).

In addition to the New York State Civil Rights Law, and its attendant statutes, we submit that unless the language of Section 80.8(a) untold numbers of possible Federal criminal offenses could be charged to any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, including any successor, assign, or transferee thereof...." 45 CFR 80.13(i). (See, for instance, 18 U.S.C. §§ 241, 245).

The decision in Hannah discussed above was reaffirmed in the case of Jenkins v. McKeithen, 395 U.S. 411 (1968)at 427. Jenkins not only reaffirms Hannah, but presents a more

recent expression of the Court's designation of "adjudicatory" investigation. Jenkins concerned the Labor-Management Commission of Inquiry which had been created by the State of Louisiana to investigate and make public findings of probable criminal violations of State or Federal labor laws, and to request the Governor to refer such matters to the State Attorney General for prosecutive action. The appellant in Jenkins, a labor union official, charged, inter alia, that certain provisions of the investigatory procedures followed by the Commission violated the Equal Protection and Due Process clauses of the Fourteenth Amendment. The sections complained of provided that "neither a witness nor any other private party has the right to call anyone to testify," 395 U.S. at 419, or to cross-examine any other witness. However, witnesses could submit questions to the Commission to be asked of other witnesses, and the rules provided that:

> "In executive session the Commission must allow the person who might be defamed, or incriminated, the opportunity to appear and be heard, and to call a reasonable number of witnesses on his behalf." 395 U.S. at 418.

After reaching a determination of the appellant's standing to sue (which we return to below), the Court found that pursuant to Hannah v. Larche, supra, which requires that where an administrative investigation has accusatory elements "the rigorous protections relevant to criminal prosecutions might well

be the controlling starting point for assessing the protection" to be provided, 363 U.S. at 488.

> "It is clear that the procedures of the Commission do not meet the minimal requirements made obligatory on the States by the Due Process Clause of the Fourteenth Amendment. Specifically, the Act severely limits the right of a person being investigated to confront and cross-examine the witness against him. Only a person appearing as a witness may cross-examine other witnesses. Cross-examination is further limited to those questions which the Commission 'deems to be appropriate to its inquiry.'" 395 U.S. at 428.

A comparison of the standards set forth in Jenkins and the scheme presently before this Court uncovers a manifest violation of the Fifth Amendment right of due process.

EEO-5 and, by implication, Special Compliance Report racial and ethnic data is public information. The Equal Employment Opportunity Commission, Office of Civil Rights and Office of Education "plan to publish or otherwise make available statistics combining school systems into geographical aggregates, such as States, regions, etc.... The Office for Civil Rights may, as in some of its previous surveys, publish data by school system and for individual schools ... " (emphasis added). (EEOC - Form 168 "Elementary-Secondary Staff Information (EEO-5) #9, at page 3).

Whereas in the scheme presented in Jenkins, a limited right to confront accusers and be heard prior to possible indictment was accorded, in this situation the offending compliance data is wrenched from the pen of the reporting "witness"

who is not informed of the nature of the complaints being leveled against him and his peers. Where civil or criminal legal action is being contemplated, the accused party is afforded no hearing on the merits in indictment or suit. 45 CFR 90.8(d) simply allows the accused the courtesy of a 'last chance' to voluntarily comply prior to being indicted or sued. Furthermore, no chance to question the informational accuracy or interpretation of the raw compliance data is afforded before it can be published or used to establish a crime. Hearings are only afforded to a school system prior to termination of assistance (see 45 CFR 80.9).

Since the Court in Jenkins saw fit to strike down the Louisiana investigatory procedure based upon its failure to meet "the rigorous protections relevant to criminal prosecutions " (re Hannah); and there being several key elements of the investigatory procedure presently before the Court which clearly fail to meet even the unacceptable standards presented by the Jenkins facts; and since the li e of authority keystoned by Byers, Hannah and Jenkins set forth a consistent policy of the Supreme Court that adjudicatory investigations must afford due process protections where possibly incriminating information is being coerced, we submit that the investigatory scheme currently before the Court is clearly adjudicatory for the reasons that (a) it includes investigations of violations of statutory and Constitutional duties, and (b) these violations can result in "a recommendation that appropriate proceedings be brought" to enforce any State or Local or Federal law.

C. Coercion of the EEO-5 and Special Compliance Information Violates the Privilege Against Self-Incrimination as Applied in Administrative Adjudicatory Investigations.

We submit that the information currently being coerced from the school principals and supervisors can be shown to posess the requisite incriminating aspects sufficient to present a justiciable claim before the District Court.

The Supreme Court, in Hoffman v. United States, supra, held:

> "The privilege afforded [against self-incrimination] not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant.... But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." 341 U.S. at 486.

It was this broadening of the privilege which established the foundation for the language in Hannah, supra, and Jenkins, supra.

> "In the present contract, where the Commission allegedly makes a finding that a specific individual is guilty of a crime [and refers the evidence to law enforcement authorities] we think that due process requires the Commission to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights." 395 U.S. at 429.

By far the most exhaustive statement explaining the nexus between Fifth Amendment due process and privilege in this context is seen in California v. Byers, supra. In Byers, the Court outlines the recent history of the development of Fifth Amendment protection in the face of adjudicative investigations.

> "In order to invoke the privilege it is necessary to show that the compelled disclosures will themselves confront the claimant with 'substantial hazards of self-incrimination.'
>
> "The components of this requirement were articulated in Albertson v. SACB, 382 U.S. 70 (1965), and later in Marchetti v. United States, 390 U.S. 62 (1968), Grosso v. United States, 390 U.S. 62 (1968), and Haynes v. United States, 390 U.S. 85 (1968)." 402 U.S. at 424 (emphasis added).

Albertson presented a case similar in peculiar elements to the case before the Court. The Attorney General requested that the Subversive Activities Control Board order petitioners to register as members of the Communist Party. The Court observed:

> "The risks of incrimination which the petitioners take in registering are obvious. Form 1S-52a requires the admission of membership in the Communist Party. Such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act ... or under § 4(a) of the Sugbersive Activities Control Act ... if the [possibly criminal] admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes." 382 U.S. at 77, 78.

In Marchetti v. U.S., supra, the petitioner had been convicted for consporacy to evade the occupational tax relating to wagers and for failure to supply the occupational tax form provided for such purpose. Petitioner alleged that by providing the information under duress he would be incriminating himself. The Supreme Court held that the Fifth Amendment privilege barred the conviction since "prospective registrants can reasonably expect that registration and payment of the occupatational tax will ... readily provide evidence which will facilitate their convictions." 390 U.S. at 54. Grosso v. United States, 390 U.S. 62 (1968), and Haynes v. United States, 390 U.S. 85 (1968), cited in California v. Byers (see p. 29, supra) arise from the basic issue decided in Marchetti.

While "[i]n all these cases the disclosures condemned were only those extracted from a 'highly selective group inherently suspect of criminal activities,'" Beyers, supra, at 430, and school principals are, admittedly, normally not so situated; where the area (i.e., civil rights law) is, as seen, "permeated with criminal statutes" (as deterrents against its violation), Beyers, supra, at 430 (citations omitted), and the hazards of self-incrimination by principals substantial -- since the thrust of the present unspecified investigation is directed at the operations of school activities which principals head -- the necessity served by the privilege is manifestly not insubstantial.

We submit that the school principals and other supervisors are being singled out as a group suspected of involvement in unspecified violation of both civil and criminal statutes,

and that the information being sought properly falls into the definition of that which "has an incriminating potential." (Beyers).

D. The Fifth Amendment Due Process and Privilege Against Self-Incrimination Issues Are "Ripe" for Decision by the District Court.

We posit that the Due Process issues raised by the cases cited above carefully compared and related to the concrete circumstances now before this Court present a justiciable controversy which is characterized by (a) present coercion of individuals by government authority, (b) resistance to said coercion as improper based upon, inter alia, Fifth Amendment guarantees, and (c) recognition by the Courts that the Fifth Amendment does operate in this area of government-citizen conflicts.

In addition to the cumulative effect of closely related fact patterns and obviously relevant constitutional remedies, the case Jenkins v. McKeithen discussed supra provides a discussion of standing and justiciability (consequently, "ripeness" as it pertains to the situation at bar). The Court states: "We are met at the outset with appellees' assertion that appellant lacks standing to attack the constitutionality of" the Louisiana Labor-Management Commission's investigate procedures. 395 U.S. at 421. The basic argument offered by appellees to support this position is the fact that "appellant did not allege in his complaint that he was called to

appear before the Commission or that he expected to be called ...." Further, appellees argue that appellant lacks standing because he cannot demonstrate that he has been or will be "injured" by the operation of the challenged statute." 395 U.S. at 421. The Court replies:

> "In the present case, it is clear that appellant possesses sufficient adversary interest to insure proper presentation of issues facing the court. His allegations ... indicate that the Commission ... have carried out a series of public acts designed to injure him in various ways. Appellant's interest in his own reputation and in his economic well-being guarantee that the present proceeding will be an adversary one." 395 U.S. at 423, 424.

Consequently, even where an individual is not directly involved in the investigative procedure, if his privacy (if you will) interests are affected "it is enough that the ... alleged actions will have an effect on him." 395 U.S. at 424. In the case at bar, the individual school principals and supervisors have been directly involved in the investigatory procedure. Their complaints arise out of violence done them by the procedures' application to them in violation of Fifth Amendment due process. This direct and intimate experience with the improper elements of the administrative procedures being complained of removes any doubt of standing, justiciability, or ripeness as affects the procedural due process argument, especially in light of the much looser standards accepted in Jenkins.

As to the second Fifth Amendment element, that of the privilege against self-incrimination, the District Court found that this issue cannot become "ripe" until the privilege has actually technically been pleaded. We submit that this finding, although grounded upon a hallmark of traditional Fifth Amendment privilege litigation, does not reflect the conditions required for ripeness in the somewhat specialized area of administrative adjudicative investigations. In Albertson v. SACB, discussed supra, the Court was presented with a ripeness issue. The Court found that the privilege claim of petitioners therein was ripe due to the fact that "Petitioners asserted their privilege in their answers to the Attorney General's petitions...." 382 U.S. at 70.

However, in an important recognition of the "Hobson's choice" problem presented by the peculiar circumstances of administrative adjudicative investigations, the Court stated:

> "There are other reasons for holding that petitioners' self-incrimination claims are ripe for decision. Specific orders requiring petitioners to register have been issued. The Attorney General has promulgated regulations requiring that registration shall be accomplished on Form 1S-52a and petitioners risk very heavy penalties if they fail to register by completing and filing these forms." 382 U.S. at 70.

This statement recognizes that the technical requirement of stating the privilege is not necessary in cases such as this, where the immediacy of the ramifications of compelled incriminating testimony automatically bring the privilege into play,

is occurring under unconstitutional duress in violation of the due process clause of the Fifth Amendment. In this situation, the elements shown above are all present: (a) specific orders requiring the school principals and supervisors to fill out the prescribed forms have been issued, and (b) the school principals and supervisors risk very heavy penalties if they fail to complete these forms.

E. The Foregoing Facts and Decisions Establish That the District Court Is Presented With Both a Fifth Amendment Due Process and a Fifth Amendment Privilege Controversy.

The cases and development of facts and arguments set forth above posit two interrelated but separately identifiable issues for the District Court to hear. The due process clause has clear application to administrative adjudicative investigations. Furthermore, the privilege against self-incrimination becomes operative once possibly incriminating information is coerced in violation of the due process clause.

Therefore, we ask that the Court remand these issues to the District Court for a hearing on the merits thereof.*

* NOTE: We are aware of the recent decision of the Supreme Court in Paul v. Davis, ___ U.S. ___, 96 S.Ct. 1155 (1976). That case, arising out of the publication of an "Active Shoplifter" list by a local police department (à la Constantineau) does not bear directly on the arguments here at issue. The Court, speaking through Justice Rehnquist, rests its refusal to find a procedural due process violation as cognizable in the Federal Courts pursuant to 42 U.S.C. § 1983, upon the grounds that the interest in reputation alone is not cognizable as a liability or property within the due process clause. Our arguments rest on consideration of legal rights which are only engendered in the context of Federal activity pursuant to the Fifth Amendment.

POINT II

THE GOVERNMENT'S RIGHT TO KNOW MUST YIELD IN THIS INSTANCE TO THE PEOPLE'S RIGHT TO BE LEFT ALONE.

A. The Government May Not Constitutionally Compel The Disclosure of Racial and Ethnic Data.

The Government aspires to the acquisition, through protesting school principals, of two kinds of racial data: first, information concerning the racial composition of pedagogical personnel and school student populations (the aspect of the survey which we shall refer to as "observing" and "reporting"); second, the name and racial identity of the school principal required to complete the racial surveys (the aspect which we shall call "self-labelling").

It is as to both aspects of the Government's oppressive "study" that Intervenors object. We submit that the Government may not constitutionally compel the disclosure, through protesting school principals, of racial and ethnic data concerning the subjects referred to above. It is the burden of our submission that the Government's coercive survey, without warrant of motive more significant than an unspecified "investigation" into possible violations of law, cannot withstand the challenge summoned forth by school principals in defense of the constitutional right of privacy and freedom shielded by the First Amendment to the United States Constitution.

1. Privacy is a legally cognizable, protectible concept.

We present an issue arising under two fundamental principles of American jurisprudence: (1) that an individual must be protected from unwarranted, irrational or overbroad government intrusion into his or her affairs, and (2) that government coercion of its citizens must be based upon a carefully circumscribed, clearly recognizable authority.

Protection against governmental intrusion and its attendant coercion has come to be generally known as the "right of privacy." The right of privacy has been defined as "the principle ... of an inviolate personality." Warren and Brandeis, "The Right to Privacy," 4 Harv. L.R. 193, 205 (1890); and "the right of the individual to decide for himself how much he will share with others his thoughts, his feelings, and the facts of his personal life. It is a right that is essential to insure dignity and freedom of self-determination."*

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* Office of Science and Technology, Executive Office of the President, Privacy and Behavioral Research Panel (1967), cited in Hearings on S.1791 before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess, at 771. See also, Beany, "The Right of Privacy and AmericanLaw," 31 Law and Contemp. Prob. 253, 254 (1966), which defines the right as "the power of an individual or group to determine the extent to which another individual or group may obtain his ideas, writing or other indicia of his personality; obtain or reveal information about him, and intrude his life space."

A more recent commentator has thought that the right may be categorized to serve two separate but equally important ends. Privacy, viewed as "individual autonomy," preserves "the right to determine for oneself whether one will go through or abstain from certain experiences, such as contraception or abortion." Note, "Informational Privacy: Constitutional Challenges to the Collection and Dissemination of Personal Information by Government Agencies," 3 Hastings Const. Law Qtly. 229, 236 (1976). Separately catalogued, but equally compelling, is "informational privacy," articulately defined by Professor Alan F. Westin* as "'[the] claim of individuals ... to determine for themselves when, how, and to what extent information about them is communicated to others.'" Id., at 236. The writer suggests that both classes share similar characteristics. While neither right is explicitly found in the language of the Constitution, "both appear to be implicit in the guarantees found in the Bill of Rights and the Fourteenth Amendment. Both could seem to be part of the classic right to be let alone so eloquently described by Mr. Justice Brandeis in his dissent in Olmstead v. United States [277 U.S. 438, 478 (1928)]:

> 'The makers of our Constitution undertook to secure conditions favorable to the

* A. Westin, Privacy and Freedom (1967).

> pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men.'" Id., at 236.

We perceive that the line drawn, while analytically sound, pays greater tribute in calling to the Court's attention the heightened sophistication of the dialogue engendered in matching the slow to evolve concept with the needs of an increasingly Orwellian society. The privacy concept must, in the name of sanity, heroically shield against either kind of invasion: assaults against individual autonomy; and the as yet little challenged massive infusion, via computer, concerning all manner of thought, behavior, habit and essence of the American public at large.

It is generally conceded that the right of privacy is more a cluster of common law tort, property, and equity concepts than a clearly defined jurisprudential principle. The Constitution and Bill of Rights make no specific mention of the right, but in the last several decades, the Courts have evolved and shielded the right of privacy under several provisions of the Bill of Rights: the First Amendment (see, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); N.A.A.C.P. v.

Alabama, 357 U.S. 449 (1958)); the Fourth Amendment (see, e.g., Katz v. United States, 389 U.S. 347 (1967); Mapp v. Ohio, 367 U.S. 643 (1961); and the Fifth Amendment (see, e.g., Kent v. Dulles, 357 U.S. 116 (1958); Shapiro v. Thompson, 394 U.S. 618 (1969)). Justices Goldberg and Brennan added the Ninth Amendment to this list in Griswold, supra.

It is our submission that the instance of privacy invoked herein, defined as the resistance of school principals to the Government's effort to compel them to observe and report on the racial identities of others and to name and label themselves as belonging to an arbitrary "racial" category, claims a legitimate right to a part of the shield of the developing constitutional right of privacy. We develop that thesis below.

2. The Government's racial reporting requirement impermissibly intrudes upon school principals' right of privacy.

a. The claim of privacy ascribed herein is within the constitutional zone of privacy.

We submit that the Department of Health, Education and Welfare ("HEW") through its Office of Civil Rights intruded upon that right of privacy by compelling school principals to submit involuntarily to arbitrary, unscientific racial/ethnic identifications of themselves and others. That intrusion, moreover, followed by an immediate, awesome threat of fines and imprisonment for failure to comply, is an abusive and unpopular

exercise of governmental power.

While we readily join with HEW and OCR in the Commitment to the thorough and equitable integration of New York City's Public Schools, we cannot allow the government to trample upon the right of privacy even in an admittedly proper purpose.

b. The right of privacy balanced against the government's interest.

We submit this position with full awareness of a recent expression of the United States Supreme COurt:

> "In addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration [emphasis added], (Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 at 196 (1972).

Our protest against the ethnic reporting requirements is made without an intention or desire to frustrate the mandate of the Supreme Court. Our protest arises out of a separately defineable conviction and sensitivity to the protection of a concurrent and equally important Constitutional guarantee. Each right protected by the Constitution does not exist in a separate space or time. The fabric of the Constitution has been fashioned to provide a working society with the balance of rights and prohibitions best designed to protect individual freedom. In Bland v. Connally, 293 F.2d 855 (Cir. D.C.), the Court stated:

> "As in every case involving a contest between a legitimate government interest ... and a legitimate private interest (the right of the individual to procedural safeguards, and to freedom of expression and association) a balance must be struck." (At p. 860).

In reaffirmation of that principle, the Supreme Court, in 1961, held that the right of privacy is "no less important than any other right carefully and particularly reserved to the people." (Mapp v. Ohio, supra, at 656). In 1964, the High Court issued its landmark opinion in Griswold v. Connecticut, supra, which determination sets forth the principle that the "various guarantees [of the Bill of Rights] create zones of privacy ... [and that] ... the foregoing cases [of the Supreme Court] suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Griswold, supra, at 484.

We submit that for this Court fo force an individual to don a racial or ethnic badge against his or her will is manifestly hostile to the Bill of Rights and the best traditions of this country. The High Court has, in numerous decisions, recognized and disapproved of arbitrary racial classifications.

In Pedersen v. Burton, 400 F. Supp. 960 (1975), the District Court for the District of Columbia was presented with a challenge to two acts of Congress:

> "The first ... directs the clerk of the Superior Court ... to ascertain from marriage license applications, under oath and upon penalty of perjury, the ... 'color of the parties desiring to marry.'

> "The second ... makes 'all applications for marriage licenses,' including the portion stating the color of the applicant, open to the public.... Plaintiffs challenge ... [the statute] to the extent that it requires applicants to disclose their color, and ... to the extent that it opens this information relating to color to public inspection." 400 F. Supp. 960, 961.

In discussing the rationale for such observing, reporting, and "publication" of racial and ethnic data, the District Court stated, inter alia, that "the section's original purpose was to assist in the enforcement of laws proscribing interracial marriage ..." 400 F. Supp. at 961. "[D]efendant's counsel has pressed the point that the racial identity requirement should be upheld because it has great statistical importance." 400 F. Supp. at p. 963. The Court goes on to adopt the position of the D.C. Government rejecting the statistical argument and states:

> "While not clearly unconstitutional, the present statutory requirement is repugnant and is, in our view, unnecessary to ... the issuing of a marriage license." 400 F. Supp. at 963.

In Whitus v. Georgia, 385 U.S. 545 (1967) the Supreme Court struck down a conviction because jury lists were compiled from tax records "and the names of Negroes were designated by having a '(c)' placed opposite their names." (Whitus, supra, at 545). In Hamm v. Virginia State Board of Elections, 230 F. Supp. 156 (E.D. Va. 1964), aff'd per curiam sub nom., Tancil v. Wood, 379 U.S. 19 (1964), the Court held that provisions requiring

racially classified voter registration, property ownership, and taxation records "renders these provisions invalid under the equal protection clause of the Fourteenth Amendment." (230 F. Supp. at 158). In Anderson v. Martin, 375 U.S. 399 (1964), the Court struck down a Louisiana statute designating candidates by race on the ballot. An element basic to each of the provisions struck down is that discernible individuals are categorized racially where such a categorization serves no rational purpose.

In the case before this Court each principal in the New York City public school system is being required to name himself or herself as the member of a pre-determined racial group on pain of fine and imprisonment. Furthermore, this fact is not confidential, and may be published by OCS "for individual schools" (see Statement of Facts). This condition is a flagrant violation of the right of privacy in all its aspects. We develop that thesis below.

We submit that for this Court to force an individual to classify those around him or her by arbitrarily determined racial or ethnic appearances harkens to the most offensive coercive elements present in totalitarian regimes. The Supreme Court recognized the grave danger implicit in requiring citizens to inform on their peers. In Watkins v. United States, 354 U.S. 178 (1957), and Sweezy v. New Hampshire, 354 U.S.234(1957),

the Supreme Court combatted the hysteria which gripped this country concerning the "Red Menace" in the late 1950's. In both cases, the Court struck down contempt citations (contempt of Congress in the case of Watkins) which were issued after the petitioners refused to supply information as to their associates. In Watkins, Chief Justice Warren, writing for the Court, stated: "We do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these [First Amendment] fields . . ." (Watkins, supra, at 186). Whenever the Government is given unbridled power to yield information from those whose only "crime" is that they "know the answers", the right of privacy as well as the attendant right of free speech are trampled. We do not contend that the compiling of general data concerning the racial composition of the New York City School system is unconstitutional, or even improper (see Keyes, supra). We base our arguments on the freedom of privacy as developed by this Court. In the landmark privacy case of Shelton v. Tucker, 364 U.S. 479 (1960), Mr. Justice Harlan, writing for the Court, stated:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the

> same basic purpose. . . . As recently as last Term we held invalid an ordinance . . . because the breadth of its application went far beyond what was necessary to achieve a legitimate government purpose. Talley v. California, 362 U.S. 60 (Shelton, at 488).

The entire thrust of our position points toward an unconstitutional administration of a constitutionally framed purpose by HEW and OCR. Ever since racial quotas and ethnic composition became accepted as basic elements of civil rights remedial programs, many sympathetic and thoughtful commentators have included a caveat in their support of integration decisions and programs. In their 1970 edition, Gunther and Dowling asked:

> When is a racial classification 'benign'? Is judicial permissiveness toward benign programs (against a background of ordinarily strict scrutiny for racial criteria) questionable because of the ambiguity of the 'benign' characterization and of the difficulties in assessing whether the challenged government action truly is 'benign'? (Cases and Materials on Constitutional Law, Gunther and Dowling, Foundation Press, 1970.

Any racial classification which is coerced on pain of prison or fines is anything but benign. Any racial classification which directly abrogates the right of privacy, requires the ordinary strict scrutiny of racial classification applied in such cases as Hamm, and Tancil v. Wood, supra. We do not dispute the Government's position that racial and ethnic data

are an important part of monitoring the integration purpose and scheme. But, we are unswerving in our opposition to the massive coercion now occurring to force individual school principals and others to classify themselves and those around them. We have constantly offered readily operable alternatives to this unconstitutional coercion to HEW, the United States Attorney, and to this Court. In one instance, this Court has, indeed, seen fit to order that government agents carry out the reporting requirements instead of the principal and his aides. In the words of Mr. Justice Harlan, there are clearly "less drastic means for achieving the same basic purpose" here.

As important as the type of information sought, the confidential status of the information once gathered, has been seen as controlling in recent privacy cases. In Buckley v. Valeo, 519 F.2d 821 (1975), aff'd in part and rev'd in part 96 S. Ct. 612 (1976), the D. C. Circuit stated that reporting requirements under the Federal Elections Campaign Act are constitutional because:

> The confidential status of those records precludes any claim of real or threatened injury to plaintiff's First Amendment interests arising from public disclosure. We discern no basis in the statute for authorizing disclosure outside the commission in the absence of probable cause to suspect a violation, and hence no substantial 'inhibatory effect' operating at this time (at 864).

Moreover, in its affirmance of the relevant portion of Buckley, the Supreme Court has reaffirmed the basic test that:

> We have long recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes, cannot be justified by a mere showing of some legitimate government interest. Since [N.A.A.C.P. v.] Alabama we have required that the subordinating interest of the State must survive exacting scrutiny. (Buckley, 96 S. Ct. at 656.)

In the administrative and statutory scheme involved here, there is no protection of the confidentiality of racial or ethnic data as collected, instead:

> The Office of Civil Rights may, as in some of its previous surveys, publish data by school system and for individual schools . . . [underscoring added]. (See Statement of Facts, supra.)

We also submit that the First Amendment right of free speech has been clearly violated. Here, the school principals and their aides are being compelled to render subjective racial or ethnic evaluations based upon appearances and inferences without regard to the fact that common sense dictates that often these inferences are premised upon the very worst traditions of racism and ethnic hatred. For instance, one only has to review the racial "theories" of Nazism to see the graphic portrayal of the ultimate result of this pseudo-science of physical typology. Furthermore, in a cosmopolitan city like New York, literally hundreds of thousands of individuals are of

mixed ancestry. How are these principals to categorize them? A recent commentator observed:

> Perhaps the greatest irony of the civil rights movement in the United States is the gradual reintroduction of racial and ethnic classifications that not only are contrary to scientific fact and common sense, but also negate the constitutional ideology that all American citizens are entitled to equal treatment and justice from their government. . . . (Racial and Ethnic Classifications: An Appraisal of the Role of Anthropology in the Lawmaking Process, 10 Houston Law Rev. 641 (1973)).
>
> The problem, to which lawyers and social scientists must address themselves, is the degree to which the judicial and legislative processes must respond to public misconceptions and a noxious social reality while striving to safeguard the basic ideology that only one kind of citizenship exists in our pluralistic society. (ibid. at p. 647).

The Supreme Court has consistently protected First Amendment rights from improper government coercion. In such cases as N.A.A.C.P. v. Alabama (357 U.S. 449, 78 S. Ct. 1163 (1958)); Bates v. Little Rock, 361 U.S. 516 (1960); and Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark.), aff'd 393 U.S. 14, 89 S. Ct. 47 (1968)(mem), the Court has upheld the right of free speech and association in the face of coercive inquiries for membership lists of "minority" or unpopular organizations.

We ask this Court to protect school principals' rights to refrain from being compelled to identify themselves and compile a racial and ethnic catalogue of their associates.

The dangers represented by such action are not theoretical. They are immediate and real. We need only direct this Court's attention to the relatively recent case of Lytell v. Louisiana State Board of Health, 153 So.2d 498, app. div. 156 So.2d 55, 244 La. 1000, (1963) wherein the Court of Appeals of Louisiana held that:

> Relators here have not shown, . . . that they are entitled to the relief prayed [that relator be declared "white"]. Relators offered no witnesses from Plaquemines Parish to refute, rebut or contradict the testimony of Defendant's witnesses from that Parish, or the prima facie correctness of the public and church baptismal records. Their failure to do so must lead to the conclusion that they were unable to do so.
>
> If this record contained only evidence of the acceptance of James Lytell and his children . . . as white persons, birth certificate declaring them to be white should properly be issued. . . . However, . . . anyone with a traceable amount of negro blood is legally deemed to be of the colored race. Since James Lytell is colored, his children are colored (Lytell, at 503).

Such perpetuation of racism in its rawest form has been the necessary result of rampant racial typology and classification. The school principals here involved wish to insure that they are not conspirators to such a result.

3. Conclusion.

We have squarely presented this Court with grave constitutional issues arising out of a manifest abrogation of the right of free speech and privacy as they are protected by the First, Fourth, Fifth, and Ninth Amendments. In view of such landmark cases as Griswold v. Connecticut, supra, and Shapiro v. Thompson, supra, we submit that the coercion of racial identification in this context is abhorrent to fundamental rights and "basic liberty" (see Skinner v. Oklahoma, 316 U.S. 535 (1942) enjoyed by citizens of the United States.

In his concurring opinion in Griswold, Justice Goldberg set forth the Supreme Court's historic position that:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to rank as fundamental.' Snyder v. Massachusetts, 291 U.S. 97, 105. The inquiry is whether a right involved 'is of such a character' that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . .' Powell v. Alabama, 287 U.S. 45, 67. 'Liberty' also 'gains content from the emanations of . . . specific [constitutional] guarantees' and 'from experience with the requirements of a free society.' Poe v. Ullman, 367 U.S. 497, 517 (dissenting opinion of Mr. Justice Douglas).

We pray that this Court recognize that the protest of hundreds of school principals and administrators is rooted in the principles of liberty and justice deserving the protection of the Court. The Government has here sought to enforce an admittedly proper objective by an administrative scheme which is overbroad as well as unnecessary, and which clearly abridges the rights of school principals, teachers, and students to privacy and free speech.

CONCLUSION

Appellants-Intervenors respectfully request that this honorable Court find that:

1. Part VI of the Magistrate's Report is ripe for decision, in that there is a justiciable issue arising from the fact that school supervisory personnel are being required to produce involuntarily possible incriminating information concerning the racial composition of their school populations without the benefit of due process and the right to invoke the privilege against self-incrimination; and that

2. School supervisory personnel may claim a constitutional right of privacy against involuntary disclosure of personal racial and ethnic characteristics as well as information concerning the racial and ethnic composition of pedagogical and student populations,

for the considerations and pursuant to the authority set forth hereinabove.

Respectfully submitted,

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Of Counsel

ADDENDUM

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EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
WASHINGTON, D.C.

School Reporting Committee (EEO–5):
Equal Employment Opportunity Commission,
Office for Civil Rights (HEW), and
The National Center for
Education Statistics

EEOC FORMS 168A and B, ELEMENTARY SECONDARY STAFF INFORMATION (EEO–5)
GAO No. B–180541(R0046)
INSTRUCTIONS FOR FILING AND RECORDKEEPING REQUIREMENTS
(Definitions of Terms and Categories are Located in the Appendix)

Federal law requires that the Equal Employment Opportunity Commission (EEOC) and the Office for Civil Rights (OCR) of the Department of Health, Education and Welfare (HEW) prescribe such records and reports as are necessary for the enforcement of the Civil Rights Act of 1964. Accordingly this report is required by the OCR to carry out the purposes of Title VI of the Act and by EEOC to carry out the purposes of Title VII as amended by the Equal Employment Opportunity Act of 1972.

This compliance reporting system is being implemented by the School Reporting Committee (EEO–5) in a joint effort between EEOC, OCR and the National Center for Education Statistics (NCES) for the collection of employment data of public elementary and secondary school systems or districts and schools. The applicable laws, and regulations issued respectively by the EEOC and OCR pursuant to such laws are reprinted in section 4 of the Appendix. The bases for the requirement of these data by NCES are also explained in that section of the Appendix.

1. RECORD-KEEPING AND FILING REQUIREMENTS.

Every public elementary and secondary school system or district, including every individually or separately administered district within a system, and every separately administered school, with 15 or more employees, and every individual school regardless of its size, within such system or district, is required to make or keep all records necessary for completing and filing the report EEO–5, whether or not it is required to file the report in any particular year.

The School Reporting Committee will determine each year which of these systems, districts, and schools will be required to file report EEO–5, and will notify them of that fact when it mails them the forms.

2. WHEN TO FILE.

Employment statistics must cover the payroll period closest to October 1 of the reporting year and the reports must be filed no late. than November 30, 1975

3. WHERE TO FILE

The completed reports should be forwarded to the P.O. Box indicated on the forms. All requests for additional report forms should also be directed to this address.

4. HOW TO FILE.

A report must be filed covering the employment data of all the administrative and other functions of the system and the combined employment data of all the schools within the system regardless of the employment size of individual schools. A report must also be filed for each elementary and secondary school within the system or district.

Forms will be sent directly to the school system or may be transmitted to the system through the State Education Agency. In those jurisdictions where all the data are available at a single location, reports for individual schools and the aggregate report for the system or district may be completed and certified by the central office. Where data are not available at a single location, reports should be obtained by the central office from individual schools. In such cases certification will be made by a school official.

5. REQUESTS FOR INFORMATION AND SPECIAL PROCEDURES

A school, school system or district which believes that preparation or the filing of report EEO–5 would create an undue hardship may apply to the Commission for a special reporting procedure, submitting a written, alternative proposal for compiling and reporting the required information. Only those special procedures *approved in writing* by the Commission are authorized. Such authorization will remain in effect until notification of cancellation is given.

Direct all requests for special reporting procedures and other information to: School Reporting Committee, EEO–5 —Attention: Office of Research, 2401 E St., N.W. Washington, D.C. 20506.

6. INSTRUCTIONS FOR FILING EEO–5

A. TYPE OF REPORT

There are two different forms. EEOC Form 168A is the aggregate report for the entire school system. EEOC Form 168B is the report to be completed for each individual school and instructional annex. On EEOC Form 168B, check whether the report is for a school or an annex.

(1) School System or School District Report

The report for the school system must provide summary data for all personnel employed by the school system either full-time or part-time, regardless of the location of the person's assignment to a school or other unit of the school system. Full-time personnel must be reported in Part II—A of the report; part-time personnel are to be reported in Part II-B. It is important to note that if a person is employed on a full-time basis by the school system, but assigned to one or more schools on a part-time basis in each, that person must be reported as a full-time employee on the school system report but as a part-time person on the school report. Anyone employed part-time and assigned part-time at a school must be reported as part-time on both the school system and school reports where he or she is assigned.

(2) School Report

A report must be filed for each school and each classroom facility if in a separate location from the school operated by the school system. See definition of School in section 1 of the Appendix.

Persons assigned full-time to the school must be reported in Part II-A of the matrix. Persons assigned part-time to the school, regardless of whether they are employed full-time by the school system, must be reported in Part II-B of the matrix.

B. DATA TO BE REPORTED

Part I–IDENTIFICATION INFORMATION

A. Type of Agency Which Operates the Reporting School System or School.

Check the agency which operates the reporting unit (School System or School) and which has the responsibility or ultimate authority for the employment or dismissal of a member or members of the staff.

B. SCHOOL SYSTEM IDENTIFICATION

This section may be omitted if the address information on the preprinted label is correct. If the preprinted address is incorrect, please provide the correct mailing address in this section.

C. GENERAL STATISTICS (EEOC Form 168A Only)

Enter the total number of schools and separate school facilities or ANNEXES operated by the school system. Also enter the total enrollment as of October 1 of the current year or the nearest date thereto when enrollment is stabilized.

School Information (EEOC Form 168B only)

1. Identification
   Enter the school name and address.
2. Grades Offered
   Place an "X" in each of the boxes corresponding to the grades taught in the school or separate school facility or annex. Also enter the total enrollment as of October 1 of the current year or the nearest date thereto when enrollment is considered to be stabilized.
3. Assignment of Principal
   If a principal is assigned to the school for which this report is intended, complete all the items in this section.

PART II–STAFF STATISTICS

This part of the report will reflect the number of employees who are full-time, part-time and new hires by activity assignment classification as shown in the stub of the matrix. The total for each activity assignment classification should be reported in column A. The totals must be further tabulated by sex for each of the designated racial/ethnic categories in columns B through K. The same procedure applies to the system report and the school and annex reports.

A. Full-Time Staff (See section 2 of Appendix for definitions of assignment classifications)

Lines 1–19 should include all full-time employees, except for elected and certain appointed officials (as explained in the definition of "Employee" in section 1 of the Appendix). In the school system report, include in these statistics all full-time employees of the system whether or not they are assigned part-time to one or more schools. On the other hand part-time employees of a school should not be counted as full-time employees in the school's report, even if they are full-time employees of the school system. With the exception of persons required to be reported on line 9, *Psychological*, report employees having multiple-activity assignments, such as teacher-counselor or similar combinations as is frequently the case in guidance, library, audio-visual, etc., as full-time in the assignment in which they spend at least 51 percent of the time. If the employee spends exactly 50 percent of the time in one of two assignments report him or her as full-time in the more critical one. If the time is distributed between more than two assignments, report the employee as full time in the one in which he or she spends the major portion of the time or in the more critical one if the time is evenly distributed.

B. Part-Time Staff

Lines 20 through 22 should include statistics for all part-time employees. In a report for a school, these will include

persons assigned part-time to that school, even though employed full-time by the school system.

C. NEW HIRES

Lines 23—28 should include the number of full-time new employees who appear on the payroll for the first time between July 1 and October 1 of the current year, for each of the assignment classifications listed. Use the definition of full-time shown in the Appendix for reporting new hires in school systems and individual schools. Do not report as a new hire an employee who has been on sabbatical or any other type of leave which is not considered a break in service, nor should anyone involved in a change in job category or promotion be reported as a new hire.

7. PRESERVATION OF RECORDS MADE OR KEPT

The EEO–5 report requires the combining of some data to complete the forms. Separate agency-employment data by sex and race/ethnic identification in those job categories should be maintained on site in such manner as is required in the EEO–5 report, and should be available upon request to representatives of Federal Agencies. Copies of submitted EEO–5 reports should be retained for a period of 3 years.

8. CERTIFICATION

Enter the telephone number (include area code and extension, if any), name, title, and signature of the school district official who is responsible for the report and can answer questions about it.

9. PUBLICATION OF EEO–5 DATA

The three organizations that sponsor EEO–5 operate under different legislative authorities and have different plans for publication.

The authority of the Equal Employment Opportunity Commission enables it to obtain all the data items in Part II of the form. The items which the Office for Civil Rights is authorized to obtain are shown on the copies of the forms that are marked for its use. The National Center for Education Statistics is authorized only to obtain totals by activity assignment as presented in column "A" of the form.

Within these limitations, all three organizations plan to publish or otherwise make available statistics combining school systems into geographic aggregates, such as States, regions, etc. As restricted by Section 709(e) of the Civil Rights Act of 1964, the EEOC will not publish any data other than such aggregates.

The Office for Civil Rights may, as in some of its previous surveys, publish data by school system and for individual schools. The National Center for Education Statistics will publish only individual school system data for those systems that have not indicated on the forms that they are withholding authority for such publication.

10. SUPPLY OF FORMS

Copies of EEOC Forms 168A and B and the Instruction Booklet may be ordered from the School Reporting Committee.

APPENDIX

1. DEFINITIONS

a. **"EEOC"** refers to the Equal Employment Opportunity Commission established under Title VII of the Civil Rights Act of 1964.

b. **"OCR"** refers to the Office for Civil Rights, Department of Health, Education and Welfare.

c. **"NCES"** refers to the National Center for Education Statistics, Department of Health, Education and Welfare.

d. **"School reporting committee (EEO–5)"** refers to an interagency committee representing EEOC, OCR, and NCES for the purpose of jointly sponsoring report EEO–5 and preventing any duplication of requirements by these agencies for employment statistics from institutions of elementary and secondary education.

e. **"School system or district"** refers to the political jurisdiction, or a dependent agency of a political jurisdiction charged with the responsibility for the operation of elementary and/or secondary schools within given geographic boundaries.

f. **"School"** refers to a division of the school system or district consisting of a group of pupils in one or more grade groups organized as a unit with one or more teachers to give instruction of a defined type and housed in a school plant of one or more buildings. If a school has classroom facilities in more than one geographical location, a separate school report must be filed for each separate campus location or annex.

g. **"State educational agency"** refers to an agency of a State government that has some functional or jurisdictional relationship to the operations of the school systems or districts within the State.

h. **"Employee"** refers to a person employed by a school system or district, or a school, or a State educational agency. This term shall not include any person elected to public office in a State or political subdivision of a State by the qualified voters thereof, or any person appointed by such officer to be on such officer's personal staff, or an appointee at the policy-making level, or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. However, this exemption shall not include employees subject to the civil service laws of a State government, government agency, or political subdivision.

i. **"Full-time employees"** refers to persons employed in a full-time basis during the pay period. These are the staff members of the school or the school system or district whose current assignments require their services at the school campus or who work for the school system or district for the whole day everyday (excluding temporary and substitute employees).

j. **"Part-time employees"** refers to persons employed during this pay period who are usually engaged for less than the regular full-time work week. Do not include temporary, or substitute employees.

k. **"New hires"** refers to persons who were hired for the first time or after a break in service for full-time employment by the particular school system and who appear on the

district payroll for the first time between July 1 and October 1.

2. ASSIGNMENT CLASSIFICATIONS (Lines 1 through 28 of Part II of the forms)

a. Line 1–**Officials, Administrators and Managers:** These are occupations requiring administrative personnel who set broad policies (not elected or appointed officials), exercise overall responsibility for execution of these policies, or direct individual departments or special phases of the school system, or district or school operations. Include in this category superintendent of schools, deputy, associate, and assistant superintendent of schools, school business officials, directors and administrators of district-wide programs, and other professional administrative staff. (Do Not include principals, assistant principals or supervisors of instruction). Nonprofessional supervisors of service workers, skilled crafts and laborers should be reported (counted) in their corresponding categories.

b. Line 2–**Principals:** Staff members performing the assigned activities of the administrative head of their respective schools (not school systems or districts) to whom has been delegated responsibility for the coordination and direction of the activities of the school.

c. Lines 3 and 4–**Assistant Principals:**

(1) **Teaching:** Staff members who in addition to assisting the head of a school (normally the principal) in performing the activities of directing and managing schools are also engaged in instructing pupils in courses in classroom situations.

(2) **Non-Teaching:** Assignment of staff members to perform only the professional activities of assisting the head of a school (normally the principal) in performing the activities of directing and managing a school.

d. Lines 5, 6 and 7–**Classroom Teachers:** Staff members assigned the professional activities of instructing pupils in courses in classroom situations for which daily-pupil attendance figures for the school system are kept. Include in this category music, band, physical education, and home economics teachers, etc., as classroom teachers if they teach full-time at a school campus. Report classroom teachers separately for elementary, secondary or other. Use the local school system's definition of elementary and secondary. If a teacher has responsibility at both the elementary and secondary levels, report the teacher at one level only. DO NOT report the teacher as ½ elementary and ½ secondary. "Other Classroom Teachers" applies to full-time classroom teachers who teach ungraded classes, special education, art, music, band, physical education, home economics, etc., who have not been reported in the elementary or secondary classroom teacher categories.

e. Line 8–**Guidance:** Include staff members responsible for advising pupils with regard to their abilities and aptitudes, educational and occupational opportunities, personal and social adjustments, etc.

f. Line 9–**Psychological:** Include only the following individuals: psychologists, psychometrists, psychiatrists and psychological-social workers who are engaged in providing psychological-evaluative services to pupils *for placement purposes* regardless of the amount of time spent in this activity. All other professionals engaged in placement of pupils should be reported in their most pertinent category in Part II-A such as item 1 (Officials/Administrators/Managers), item 8 (Guidance) or item 12 (Other Professional Staff), etc.

g. Line 10–**Librarians and Audio-Visual:** Librarians include staff members responsible for organizing and managing school libraries. Audio-visual personnel include staff members responsible for preparing, caring for, and making available to instructional programs, the equipment, materials, scripts, and other aids which assist teaching and learning through special appeal to the senses of sight and hearing, e.g., director of audio-visual services, scriptwriter, etc.

h. Line 11–**Consultants and Supervisors of Instructions:** Include staff members performing activities of leadership, guidance, and expertness in a field of specialization for the purpose of improving the performance of teachers and other instructional staff members.

i. Line 12–**Other Professional Staff:** Include staff members performing some instructional or related function on a full-time basis that cannot be properly classified for reporting on lines 2 through 11, such as non-classroom teachers who may be teaching the homebound, teaching through correspondence, teaching through radio or television from a studio, providing instruction for exceptional pupils released from regular classes for short periods of time, and instructing pupils in non-course (cocurricular) activities. Include persons engaged in psychotherapy and other mental health services such as psychiatrists or psychologists who are not reported in Part II-A, item 9 (See paragraph f above). Also included are professional noninstructional staff (not officials/administrators, etc.) such as physicians, dentists, speech therapists, school social workers, community workers, attendance officers, attorneys, architects, engineers, registered professional nurses and other professional noninstructional personnel.

j. Line 13–**Teacher Aide:** A staff member performing assigned activities which are not classified as professional educational, but which assist a staff member to perform professional-educational-teaching assignments. Include all personnel working with students under the direct supervision of a classroom teacher or under the direct supervision of a staff member performing professional-educational-teaching assignments on a regularly scheduled basis. In other words, aides who participate on a regularly scheduled basis in the formal educational effort directed toward the student and/or whose impressions of student educational progress or needs may contribute to the formal authorized educational evaluation of students should be classified as Teacher Aides.

Examples:

(1) Librarian aide

(a) A librarian aide who functions to fulfill particular educational needs of specific students on a regularly scheduled basis should be reported as a Teacher Aide.

(b) A librarian aide who functions essentially as a clerical or physical aide to the librarian and whose contact with particular students is

casual or irregular should be counted in the assigned dept——Librarian and Audio Visual line 10.

(2) Playground aide

(a) A playground aide who has been advised by the professional staff of the particular educational needs of specific children and who regularly directs efforts toward meeting these needs should be counted as a Teacher Aide.

(b) A playground aide whose prime function is custodial should be counted as a Service Worker–line 16.

k. Line 14–**Technicians:** Occupations requiring a combination of knowledge and manual skill which can be obtained through about 2 years of post-high school education, such as is offered in many technical institutes and junior colleges, or through equivalent, on-the-job training. Includes: computer programmers and operators, film inspectors, projectionists, graphic artists, draftsmen, engineering aides, non-teaching-related mathematical aides, licensed, practical or vocational nurses, dietitians, photographers, radio operators, scientific assistants, technical illustrators, technicians (medical, dental, electronic physical sciences), and similar occupations which cannot be properly classified in other activity assignments.

l. Line 15–**Clerical/Secretarial:** These are occupations requiring skills and training in all clerical-type work including activities such as preparing, transcribing, systematizing, or preserving written communications, and reports or operating such mechanical equipment as bookkeeping machines, typewriters and tabulating machines. Include: bookkeepers, messengers, office machine operators, clerk-typists, stenographers, court transcribers, hearing reporters, statistical clerks, dispatchers, license distributors, payroll clerks and kindred workers.

m. Line 16–**Service Workers** (paraprofessionals and persons in cafeteria maintenance, transportation, etc.): Staff members performing a service for which there are no formal qualifications including paraprofessionals and nonsupervisory personnel in cafeteria, or transportation work. Include also custodial or others with the responsibility for cleaning the buildings of school plants or supporting service facilities; maintenance and operating such equipment as heating and ventilating systems; preserving the security of school property; and keeping the school plant safe for occupancy and use. Such activities may include cleaning, sweeping, disinfecting, heating, lighting, moving furniture, keeping school entrances appropriately locked or unlocked, keeping such facilities as fire escapes and panic bars in working order, and watchmen duties.

n. Line 17–**Skilled Crafts:** Occupations in which workers perform jobs which require special manual skill and a thorough and comprehensive knowledge of the processes involved in the work which is acquired through on-the-job training and experience or through apprenticeship or other formal training programs. Includes: mechanics and repairmen, electricians, heavy equipment operators, stationary engineers, skilled machining occupations, carpenters, compositors and typesetters and kindred workers.

o. Line 18–**Laborers:** Staff members who perform manual labor not classified in another activty assignment classification. Include garage laborers, car washers and greasers, gardeners and groundskeepers or activities such as lifting, digging, mixing, loading and pulling operations.

p. Line 20–**Professional Instructional:** This classification (required under B. Part-Time Staff) should include all the activity assignment classifications listed in numbers 2 to 12 under A. Full-Time Staff in Part-II of the form.

3. RACE/ETHNIC IDENTIFICATION

You may acquire the race/ethnic information necessary for this report either by visual surveys of the work force, or from post-employment records as to the identify of employees.

Eliciting information on the race/ethnic identity of an employee by direct inquiry is not encouraged. An employee may be included in the minority group to which he or she appears to belong, or is regarded in the community as belonging.

Where records are maintained, it is recommended that they be kept separately from the employee's basic-personnel file or other records available to those responsible for personnel decisions.

Since visual surveys are permitted, the fact that race/ethnic identifications are not present on employment records is not an excuse for failure to provide the data called for.

Moreover, the fact that employees may be located at different addresses does not provide an acceptable reason for failure to comply with the reporting requirements. In such cases, it is recommended that visual surveys be conducted for the employer by persons such as supervisors who are responsible for the work of the employees or to whom the employees report for instructions or otherwise.

Please note that conducting a visual survey and keeping post-employment records of the race/ethnic identity of employees is legal in all jurisdictions and under all Federal and State laws. State laws prohibiting inquiries and recordkeeping as to race, etc., relate only to applicants for jobs, not to employees.

Race/Ethnic designations as used by the Equal Employment Opportunity Commission do not denote scientific definitions of anthropological origins. For the purposes of this report, an employee may be included in the group to which he or she appears to belong, identifies with, or is regarded in the community as belonging. However, no person should be counted in more than *one* race/ethnic group.

White (Not of Hispanic origin)–All persons having origins in any of the original peoples of Europe, North Africa, the Middle East, or the Indian subcontinent.

Black (Not of Hispanic origin)–All persons having origins in any of the black racial groups.

Hispanic–All persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

Asian or Pacific Islander–All persons having origins in any of the original peoples of the Far East, Southeast Asia, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands, and Samoa.

American Indian or Alaskan Native–All persons having origins in any of the original peoples of North America.

4. LEGAL BASIS FOR REPORTING REQUIREMENTS; RECORDKEEPING REGULATIONS

Equal Employment Opportunity Commission

a. Section 709(c), Title VII, Civil Rights Act of 1964 (as amended).

Every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder.

b. Chapter XIV, Title 29, Code of Federal Regulations

Subpart L–Public Elementary and Secondary School Systems, Districts, and Individual Schools Recordkeeping

§1602.39 Records to be made or kept.

On or before November 30, 1974 and annually thereafter, every public elementary and secondary school system or district, including every individually or separately administered district within a system, with 15 or more employees and every individual school within such system or district, regardless of the size of the school shall make or keep all records and information therefrom which are or would be necessary for the completion of report EEO–5 whether or not it is required to file such a report under §1602.41. The instructions for completion of report EEO–5 are specifically incorporated herein by reference and have the same force and effect as other sections of this part.[1] Such records and the information therefrom shall be retained at all times for a period of 3 years at the central office of the elementary or secondary school system or district, or at the individual school which is the subject of the records and the information therefrom, where more convenient, and shall be made available if requested by an officer, agent, or employee of the Commission under section 710 of Title VII, as amended. It is the responsibility of every such school system or district, to obtain from the Commission or its delegate necessary instructions in order to comply with the requirements of this section.

§1602.40 Preservation of records made or kept.

(a) Any personnel or employment record made or kept by a school system, district, or individual school (including but not necessarily limited to application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, layoff, or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by such school system, district, or school, as the case may be, for a period of 2 years from the date of the making of the record or the personnel action involved, whichever occurs later. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of 2 years from the date of termination. Where a charge of discrimination has been filed, or an action brought against an elementary or secondary school by the Commission or the Attorney General, the respondent elementary or secondary school system, district, or individual school shall preserve similarly at the central office of the system or district or individual school which is the subject of the charge or action, where more convenient, all personnel records relevant to the charge or action until final disposition thereof. The term "personnel record relevant to the charge," for example, would include personnel or employment records relating to the person claiming to be aggrieved and to all other employees holding positions similar to that held or sought by the person claiming to be aggrieved; and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the person claiming to be aggrieved applied and was rejected. The date of "final disposition of the charge or the action" means the date of expiration of the statutory period within which a person claiming to be aggrieved may bring an action in a U.S. district court or, where an action is brought against a school system, district, or school either by a person claiming to be aggrieved, the Commission, or the Attorney General, the date on which such litigation is terminated.

(b) The requirements of this section shall not apply to application forms and other pre-employment records of applicants for positions known to applicants to be of a temporary or seasonal nature.

Subpart M–Elementary-Secondary Staff Information Report

Sec.

1602.41 Requirement for filing and preserving copy of report.
1602.42 Penalty for making of willfully false statements on report.
1602.43 Commission's remedy for school systems', districts', or individual schools' failure to file report.
1602.44 School systems', districts', or individual schools' exemption from reporting requirement.
1602.45 Additional reporting requirements.

AUTHORITY–Sec. 709(c), 78 Stat. 265, 42 U.S.C. sec. 2000e-8(c); 29 CFR 1602.3.

§1602.41 Requirement for filing and preserving copy of report.

[1] Note – Instructions were published as an appendix to the proposed regulations on June 12, 1973 (38 F.R. 15463).

(a) On or before Nov. 30, 1974 & annually thereafter, certain public elementary and secondary school systems and districts, including individually or separate administered districts within such systems, and individual schools within such systems or districts shall file with the Commission or its delegate executed copies of Elementary-Secondary Staff Information Report EEO–5 in conformity with the directions set forth in the form and accompanying instructions. The elementary and secondary school systems and districts covered are: (1) every one of those which have 100 or more employees, and (2) every one of those others which have 15 or more employees from whom the Commission requests the filing of reports. Every such elementary or secondary school system or district shall retain at all times, for a period of 3 years, a copy of the most recently filed report EEO–5 at the central office of the school system or district, or the individual school which is the subject of the report, where more convenient, and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of section 710 of Title VII, as amended. It is the responsibility of the school systems or districts above described in this section to obtain from the Commission or its delegate necessary supplies of the form.

(b) For calendar year 1973, the requirements of paragraph (a) of this section shall be carried out on or before November 30, 1973.

§1602.42 Penalty for making of willfully false statements on report.

The making of willfully false statements on report EEO–5 is a violation of the United States Code, title 18, section 1001, and is punishable by fine or imprisonment as set forth therein.

§1602.43 Commission's remedy for school systems, districts', or individual schools' failure to file report.

Any school system, district, or individual school failing or refusing to file report EEO–5 when required to do so may be compelled to file by order of a U.S. district court, upon application of the Commission or the Attorney General.

§1602.44 School systems', districts', or individual schools' exemption from reporting requirements.

If it is claimed that the preparation or filing of the report would create undue hardship, the school system, district, or individual school may apply to the Commission for an exemption from the requirements set forth in this part by submitting to the Commission or its delegate a specific proposal for an alternative reporting system prior to the date on which the report is due.

§1602.45 Additional reporting requirements.

The Commission reserves the right to require reports, other than that designated as the Elementary-Secondary Information Report EEO–5, about the employment practices of private or public individual school systems, districts, or schools, or groups thereof, whenever, in its judgment, special or supplemental reports are necessary to accomplish the purposes of Title VII. Any system for the requirement of such reports will be established in accordance with the procedures referred to in section 709(c) of Title VII and as otherwise prescribed by law.

Subpart N–Records and Inquiries as to Race, Color, National Origin, or Sex

§1602.46 Applicability of State or local law.

The requirements imposed by the Equal Employment Opportunity Commission in these regulations, subparts L and M of this part, supersede any provisions of State or local law which may conflict with them.

Office for Civil Rights

a. H.E.W. Regulation (45 CFR), Title VI, Civil Rights Act of 1964.

§80.6 Compliance information.

(a) *Cooperation and assistance.* The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

b. Sections 901 (b) and (c) and Section 902, Title IX, Education Amendment of 1972, Public Law 92—318, 92nd Congress, S. 659, June 23, 1972. (H.E.W. Regulations in the process of preparation).

THE NATIONAL CENTER FOR EDUCATION STATISTICS

Title V—Amendments Relating to Education Administration, Education Amendments of 1974, Public Law 93–380, 93rd Congress, H.R. 69, August 21, 1974. (20 U.S.C. 1221e–1).

Sec. 406 (b)

"(b) The purpose of the Center shall be to collect and disseminate statistics and other data related to education in the United States and in other nations. The Center shall—

"(1) collect, collate, and, from time to time, report

full and complete statistics on the conditions of education in the United States;

"(2) conduct and publish reports on specialized analyses of the meaning and significance of such statistics;

"(3) assist State and local educational agencies in improving and automating their statistical and data collection activities; and

"(4) review and report on educational activities in foreign countries.

"(f) (1) (A) The Center is authorized to furnish transcripts or copies of tables and other statistical records of the Office of Education, the Assistant Secretary, and the National Institute of Education to, and to make special statistical compilations and surveys for, State or local officials, public and private organizations, or individuals. The Center shall furnish such special statistical compilations and surveys as the Committees on Labor and Public Welfare and on Appropriations of the Senate and the Committees on Education and Labor and on Appropriations of the House of Representatives may request. Such statistical compilations and surveys, other than those carried out pursuant to the preceding sentence, shall be made subject to the payment of the actual or estimated cost of such work. In the case of nonprofit organizations or agencies, the Assistant Secretary may engage in joint statistical projects, the cost of which shall be shared equitably as determined by the Assistant Secretary: Provided, That the purposes of such projects are otherwise authorized by law.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ELEMENTARY-SECONDARY STAFF INFORMATION (EEO-5)

Public school systems (Schools and Annexes)

FORM APPROVED BY GAO B-180541 (R0048) EXPIRES 12-31-76

This is a joint requirement of the EEOC and Office for Civil Rights and the National Center for Education Statistics of the Department of Health, Education, and Welfare

NOTE: Instructions for filing are given in the enclosed booklet. Additional copies of this form may be obtained from your district superintendent.

SEND COMPLETED COPIES OF THIS FORM TO YOUR DISTRICT SUPERINTENDENT FOR TRANSMITTAL TO WASHINGTON BY THE FILING DEADLINE

TYPE OF REPORT ☐ INDIVIDUAL SCHOOL ☐ ANNEX

PART I. IDENTIFICATION

A. TYPE OF AGENCY WHICH OPERATES THE REPORTING SCHOOL SYSTEM OR SCHOOL

☐ Local Public School System
☐ Special or Regional Agency
☐ State Education Agency
☐ Other (Specify) _____

B. SCHOOL SYSTEM IDENTIFICATION (SKIP IF SAME AS LABEL)

NAME				
STREET AND NO. OR POST OFFICE BOX	CITY/TOWN	COUNTY	STATE	ZIP

C. SCHOOL INFORMATION

1. IDENTIFICATION

NAME				
STREET AND NO. OR POST OFFICE BOX	CITY/TOWN	COUNTY	STATE	ZIP

2. GRADES OFFERED (PLACE AN "X" UNDER EACH GRADE OFFERED IN THIS SCHOOL)

Pre K	K	1	2	3	4	5	6	7	8	9	10	11	12	Ungraded	Special Education	OCTOBER 1ST ENROLLMENT
☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	

3. INFORMATION ABOUT PRINCIPAL (CHECK AS APPROPRIATE)

IS A PRINCIPAL ASSIGNED TO THIS SCHOOL? ☐ YES ☐ NO

IF YES ☐ FULL TIME ☐ PART TIME

IF FULL TIME, DOES THE PRINCIPAL HAVE A TEACHING ASSIGNMENT? ☐ YES ☐ NO

SEX ☐ MALE ☐ FEMALE

RACE/ETHNIC IDENTITY (CHECK ONE)
☐ WHITE (NOT OF HISPANIC ORIGIN) ☐ BLACK (NOT OF HISPANIC ORIGIN) ☐ HISPANIC
☐ ASIAN OR PACIFIC ISLANDER ☐ AMERICAN INDIAN OR ALASKAN NATIVE

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PART II. STAFF STATISTICS AS OF _____ (DATE)

DO NOT INCLUDE ELECTED/APPOINTED OFFICIALS (SEE DEFINITION IN APPENDIX)

SCHOOL NAME _____ SCHOOL ID #: _____

ACTIVITY ASSIGNMENT CLASSIFICATION	OVERALL TOTALS (SUM OF COL B THRU K)	STAFF TOTALS — MALE					FEMALE				
		WHITE NOT OF HISPANIC ORIGIN	BLACK NOT OF HISPANIC ORIGIN	HISPANIC	ASIAN OR PACIFIC ISLANDER	AMERICAN INDIAN OR ALASKAN NATIVE	WHITE NOT OF HISPANIC ORIGIN	BLACK NOT OF HISPANIC ORIGIN	HISPANIC	ASIAN OR PACIFIC ISLANDER	AMERICAN INDIAN OR ALASKAN NATIVE
	A	B	C	D	E	F	G	H	I	J	K
A. FULL TIME STAFF											
1 Officials Administrators Managers											
2 Principals											
3 Assistant Principals Teaching											
4 Assistant Principals Nonteaching											
5 Elementary Classroom Teachers											
6 Secondary Classroom Teachers											
7 Other Classroom Teachers											
8 Guidance											
9 Psychological											
10 Librarians/Audiovisual Staff											
11 Consultants & Supervisors of Instruction											
12 Other Professional Staff											
13 Teacher Aides											
14 Technicians											
15 Clerical/Secretarial Staff											
16 Service Workers											
17 Skilled Crafts											
18 Laborers, Unskilled											
19 TOTAL (1-18)											
B. PART-TIME STAFF											
20 Professional Instructional											
21 All Other											
22 TOTAL (20-21)											
C. NEW HIRES (7/1/75 - 10/1/75)											
23 Officials Administrators Managers											
24 Principals/Asst Principals											
25 Classroom Teachers											
26 Other Professional Staff											
27 Nonprofessional Staff											
28 TOTAL (23-27)											

CERTIFICATION: I certify that the information given in this report is correct and true to the best of my knowledge and was prepared in accordance with accompanying instructions. Willfully false statements on this report are punishable by law, U.S. Code, Title 18, Section 1001

Date	Phone (Include Area Code)	Typed Name/Title of Person Responsible for Report	Signature

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ERRATA

p. 20 First sentence of second paragraph should read: The basic dichotomy between 'investigatory' and 'adjudicatory' administrative activity, etc., etc.

p. 22 At line 10 of passage quoted at center page, "prosperity" should read "property".

p. 24 At fourth line below quoted passage, quotation marks should be inserted between "to" and "any".

p. 26 At second line of third paragraph, "is" should read "are".

p. 28 At first line of passage quoted at bottom of page, "contract" should read "contact".

p. 30 At second line, top of page, "consporacy" should read "conspiracy".

p. 30 At eighth line, top of page, "occupatational" should read "occupational".

p. 30 At third line of second paragraph, "Beyers" should read "Byers".

p. 31 At third line at top of page, "(Beyers)" should read "(Byers)".

p. 31 At sixth line of Section D, "improper" should read "improperly".

p. 31 At fourth line from bottom, "investigate" should read "investigative".

p. 37 At sixth line from bottom, "Both could seem. . ." should read "Both would seem. . .".

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